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NO. 89-742

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JAMES A. LYNAUGH,

Petitioner

v.

CARROLL F. YOUNGBLOOD,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Jon R. "Randy" Farrar
Administrator, Inmate Legal Services

Staff Counsel for Inmates
Texas Department of Criminal Justice
Institutional Division
P. O. Box 99
Huntsville, Texas 77342-0099
(409)294-2363

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(9)

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QUESTION PRESENTED

Whether the retrospective application of a procedural change in the law, which alters an accused's "substantial personal rights," violates the Ex Post Facto Clause, Article I, §10 of the United States Constitution.

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BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Carroll F. Youngblood, Respondent, by and through his attorney, Jon R. "Randy" Farrar, and files this Brief in Opposition to James A. Lynaugh's Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, wherein the Respondent was granted relief, is attached as Appendix A. Youngblood v. Lynaugh, 882 F.2d 956 (5th Cir. 1989). The order of the court of appeals denying the state's suggestion of rehearing en banc is attached as Appendix B. The opinion of the federal district court is attached as Appendix C. The opinion of the Texas Court of Criminal Appeals denying Respondent's application for a writ of habeas corpus is attached as Appendix D. Ex parte Youngblood, 698 S.W.2d 671 (Tex. Crim. App. 1985)(en banc).

JUPISDICTION

The judgment of the Court of Appeals was entered on September 8 1989. Petitioner's suggestion for rehearing en banc was denied on October 19, 1989.

The petition for writ of certiorari was timely filed invoking the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. Art. I., §10, cl. 1 provides as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Tex. Code Crim. Proc. Ann. art. 37.10(b)(Vernon Supp. 1985) provides as follows:

> If the jury assesses punishment in a case and in the verdict assesses both punishment that is authorized by law for the offense and that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

STATEMENT OF THE CASE

On March 17, 1982, Respondent was convicted of Aggravated Sexual Abuse, a first degree felony. During the punishment phase of the trial, the jury found that Respondent had been previously convicted of a felony; consequently, Respondent's punishment was enhanced and he was sentenced to life in prison and a fine of $10,000. The Twelfth Supreme Judicial District Court of Appeals, in Tyler, Texas, affirmed the conviction on August 13, 1984. Respondent did not appeal the conviction further. Note that the conviction became final before the effective date of Tex. Code Crim. Proc. Ann. art. 37.10(b), which was on June 11, 1985.

On September 19, 1984, Respondent filed an application for a writ of habeas corpus pursuant to a decision by the Texas Court of Criminal Appeals in Bogany v. State, 661 S.W.2d 957 (Tex. Crim. App. 1983). The Court in Bogany held that the enhancement provision of Tex. Penal Code §12.42(c)(Vernon Supp. 1979) does not authorize the punishment to include a fine in addition to a prison sentence. The Court concluded that the jury's verdict, therefore, was "void at its inception" and the judgment was reversed. In light of Bogany, Respondent had legal precedence for a meritorious writ of habeas corpus and a reasonable expectation that his conviction would be reversed. The trial court, in its recommendation to the Court of Criminal Appeals, concluded that relief should be granted (ROA 45).

However, after Bogany was decided and after the Court of Criminal Appeals reversed several other convictions with fact situations similar to Bogany, the Texas Legislature passed Tex. Code Crim. Proc. Ann. art. 37.10(b):

> If the jury assesses punishment in a case and the verdict assesses both punishment that is authorized by law for the offense and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

Again the statute went into effect on June 11, 1985. On October 8, 1985, the Texas Court of Criminal Appeals announced its decision in Ex parte Johnson, 697 S.W.2d 605 (Tex. Crim. App. 1985), which held that the new statute was merely procedural in nature and could be applied retrospectively. In dissent, Judge Onion expressed the opinion that the retroactive application of the statute had a substantive effect and violated the Ex Post Facto Clause. One week later, on October 16, 1985, the Court of Criminal Appeals denied Respondent's application for writ of habeas corpus, basing its decision on Ex parte Johnson. As in Johnson, the Court applied the new statute to Respondent's conviction even though his conviction had become final prior to the enactment of the new statute. Ex parte Youngblood, 698 S.W.2d 671 (Tex. Crim. App. 1985) (App. D). Consequently, the Respondent filed his pro se petition for a writ of habeas corpus with the United States District Court in Tyler, basing his petition on the dissent presented by Judge Onion.

The United States District Court initially issued an order summarily dismissing the application (ROA 51). Respondent consequently sought and received assistance from Staff Counsel for Inmates. Counsel filed a Motion to Reconsider (ROA 36), and, in the alternative, Notice of Appeal (ROA 29). In response, the Court withdrew its earlier order and ordered a hearing on the merits (ROA 28). The District Court issued its decision on September 13, 1988, denying Respondent's allegation that the retrospective application of Tex. Code Crim. Proc. Ann. art. 37.10(b), by the Texas Court of Criminal Appeals, violates the Ex Post Facto Clause of the Constitution (ROA 8) (App. D). Respondent again filed notice of appeal (ROA 7) and requested a certificate of probable cause (ROA 6). In response, Judge Parker issued a certificate of probable cause to the Court of Appeals (ROA 1).

The Court of Appeals for the Fifth Circuit considered the appeal and granted relief on September 8, 1989. Youngblood v. Lynaugh, 882 F.2d 956 (5th Cir. 1989) (App. A). On October 19, 1989, the Court of Appeals denied the Petitioner's suggestion for rehearing en banc (App. B).

SUMMARY OF ARGUMENT

There are no special and important reasons for granting the writ. The decision by the Court of Appeals for the Fifth Circuit simply applied the holdings heretofore announced by the Supreme Court to the facts in this case.

The State of Texas has misrepresented the law in alleging that the retrospective application of procedural laws cannot violate the Ex Post Facto Clause. This Court has a long history holding to the contrary. As recently as 1987, the Court held that a change in a procedural law can fall within the ex post facto prohibition if it alters "substantial personal rights." Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987). See also Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Thompson v. Utah, 170 U.S. 343, 352, 18 S.Ct. 620, 623, 42 L.Ed. 1061 (1897).

Furthermore, the State has ignore the standard of review heretofore announced and presently employed by this Court. Two critical elements must be present for a law to fall within the ex post facto prohibition. First, it "'must be retrospective, that is, it must apply to the events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" Miller, 482 U.S. at 430, 107 S.Ct. at 2451, quoting Weaver, 450 U.S., at 29, 101 S.Ct., at 964. Utilizing this standard, the Court of Appeals appropriately concluded that the retrospective application of Tex. Code Crim. Pro. Ann. art. 37.10(b) violates the Ex Post Facto Clause.

ARGUMENT AND AUTHORITIES

There are no special and important reasons for granting the writ. In presenting its case, the State of Texas has misrepresented the law on this issue. It has limited and focused its discussion to only one part of the Court's past decisions, as seen in the Petitioner's emphasis on the following excerpt from Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done;

> which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Id. at 169-70, quoted in Dobbert v. Florida, 432 U.S. 282, 292 (1977). Petitioner implies that if a case does not fall within the parameters of this provision, an accused is not entitled to relief.

Petitioner has, however, ignored the bulk of the holdings of the Court on this issue. For example, in Beazell, the Court went on to say that "there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition." 269 U.S., at 170. The Court of Appeals characterized the State's approach as presenting case law to "erroneously suggest that a statute must fit neatly within the confines of one of these enumerated holes or else may not rightly be said to violate the Ex Post Facto clause." 882 F.2d, at 959. The State basically is misrepresenting the law to unduly limit the value of the Ex Post Facto Clauses.

The Supreme Court's past decisions on this issue clearly indicate that the value of the Ex Post Facto Clause is broad, rather than narrow. Or, as Judge Gee concluded, the possibility that a retrospective application of a procedural change in the law will violate the Ex Post Facto Clause "constitutes more of a bright spectrum than a bright line." Youngblood, 882 F.2d, at 960.

The Supreme Court first considered the prohibition against ex post facto laws in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). In an oft-quoted opinion, Justice Chase listed exemplary kinds of laws barred by the constitutional provision, including:

> Every law that alters the legal rules of evidence, and requires less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. (3 U.S. 390)

The next sentence in Justice Chase's opinion is not quoted as often, but he adds that the prohibition includes all other similar kinds of laws: "All these, and similar laws, are manifestly unjust and oppressive."

The Court has, of course, specified limits on the concept. The prohibition against ex post facto laws does not extend to every change of law that "may work to the disadvantage of a defendant." It is intended instead to

secure "substantial personal rights" from retroactive deprivation. Portley v. Grossman, 444 U.S. 1311, 1312, 100 S.Ct. 714, 62 L.Ed.2d 723 (1980); Dobbert v. Florida, 432 U.S., at 293, 97 S.Ct., at 2298 (1977). No ex post facto violation occurs if the change is merely procedural. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed.262 (1884).

On the other hand, a law that alters a substantial personal right can be ex post facto "even if the statute takes a seemingly procedural form." Weaver, 101 S.Ct., at 964; Miller, 107 S.Ct., at 2453. A procedural change in the law will come within the prohibition if the change materially disadvantages an individual. In Thompson v. Utah, supra, the Court held that a defendant cannot be retried under a new statute requiring only eight jurors, since the alleged offense was committed and first tried when applicable law guaranteed a trial by a jury of twelve.

In Weaver, supra, the Court held a Florida statute altering the availability of "gain time for good conduct" unconstitutional as an ex post facto law as applied to the petitioner whose crime was committed before the statute was enacted. The Court held once again that a law will be ex post facto if the law is retrospective and disadvantages the offender affected by it. 101 S.Ct., at 964. In this case, as in Weaver, "the provision attache[d] legal consequences to a crime before the law took effect." 101 S.Ct., at 965. Moreover, the situation of the accused has been materially altered to his disadvantage. In Weaver, the statute reduced the number of gain-time credits available to the Petitioner. In this case, the retrospective application of the art. 37.10(b) operates to deny Respondent the relief to which he was entitled, in other words, a new trial, by validating an otherwise void conviction.

The law in Texas, by comparison, also prohibits the retrospective application of procedural changes that deprives a defendant of substantial protection. In the Interpretive Commentary to the applicable Texas provision prohibiting ex post facto laws, Article I, Section 16, of the Texas Constitution (Vol. I, pp. 371, 372, Vernon's Constitution of the State of Texas, Annotated) it is written:

> Although ordinarily laws changing procedure are not within the inhibition, still if a procedural change is retroactive and results in depriving the accused of substantial protections, it is unconstitutional. Ex parte Roper, 61 [Tex] Cr.R. 68, 134 S.W. 334 (1911).

In his dissenting opinion in Ex parte Johnson, 697 S.W., at 609, Judge Onion, then presiding judge of the Texas Court of Criminal Appeals, stated that Art. 37.10(b) was an "overreaction" to Bogany. Judge Onion concluded that art. 37.10(b), when applied retroactively, clearly violated the prohibition against ex post facto legislation.

The underlying reason that "the Ex Post Facto Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary and vindictive legislation." Miller, 107 S.Ct., at 2451, quoting Calder v. Bull, 3 Dall., at 389, 1 L.Ed. 648 (1798). It is clear that the purpose for the enactment of art. 37.10(b) was to arbitrarily prevent additional inmates, such as the Respondent, from obtaining a reversal, new trial and possible acquittal. The State has attempted to downplay the significance of the detrimental impact of the statute on inmates. For a convict, however, what greater substantial personal right exists than to have his conviction reversed? The purpose of the Ex Post Facto Clauses was precisely to stop the type of activity going on here and stop legislatures from changing the law and retrospectively imposing the new law on members of society to their detriment.

The Court of Appeals appropriately granted relief because the Respondent was able to show that (1) the criminal law was applied retrospectively, and (2) that he was disadvantaged by the retrospective application of the new law. Respondent was able to satisfy both prongs of the requirements set forth in Weaver and Miller, and the Court of Appeals so found. Whereas previously the Respondent, and all others similarly situated, were entitled to a reversal and retrial, the retrospective application of the new statute resulted in a mere modification of his judgment and sentence. The change in procedure materially disadvantaged Respondent by eliminating his right to a reversal and retrial and replacing it with an affirmance of his conviction. Respondent lost the substantial personal right that comes with any retrial and possible acquittal. The constitutional prohibition against ex post facto laws clearly applies in this case. The decision of the Court of Appeals accurately applies the Supreme Court's past holdings to the facts in this case. The petition for writ of certiorari should not be granted.

CONCLUSION

For these reasons, Respondent prays that the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

CARROLL F. YOUNGBLOOD
Respondent

By: Randy Farrar
Jon F. "Randy" Farrar
Attorney for Respondent

Staff Counsel for Inmates
TDCJ-ID
P.O. Box 99
Huntsville, Texas 77342-0099
(409) 294-2363

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APPENDIX A

determination, if necessary, will not affect the liability of Local 350, since it remains jointly and severally liable for the full amount of the judgment as a successor or disguised continuance; a master's factual determination would only determine the amount of liability of the International and Vinall. Local 38, Local 350, the International, and Vinall are hereby ordered not to take any further action which would frustrate the collection of this judgment until it is satisfied, including transferring the membership of Local 350 or engaging in a business combination, and also including further petitions in bankruptcy, without this court's explicit approval. All orders in this case are binding on all successors, disguised continuances, and alter egos of any of the parties. Lastly, we award attorneys' fees and costs to the Board in the amount required to bring this civil contempt proceeding; the Board is ordered to submit affidavits regarding hours spent to this court for the fee determination.

The Board's petition in civil contempt is GRANTED to the extent noted above.

Carroll F. YOUNGBLOOD,
Petitioner-Appellant,

v.

James A. LYNAUGH, Director, Texas Department of Corrections,
Respondent-Appellee.

No. 88-2886.

United States Court of Appeals,
Fifth Circuit.

Sept. 8, 1989.

Prisoner applied for writ of habeas corpus, contending that the ex post facto clause of the Federal Constitution was violated by application against him of a statute which allows an appellate court to reform an unauthorized verdict without the necessity of remanding for retrial. The United States District Court for the Eastern District of Texas, Robert M. Parker, J., denied the writ, and prisoner appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) prisoner was not required to pursue the issue further in state-court proceedings, and (2) as applied against prisoner, the statute was ex post facto.

Reversed and remanded.

Gee, Circuit Judge, issued a concurring opinion.

Edith H. Jones, Circuit Judge, issued a concurring opinion.

1. Habeas Corpus ⇐408

Habeas corpus petitioner was not required to present to Texas state tribunal his claim that federal ex post facto clause was violated by application against him of statute which permits reformation of verdict to amend any punishment not authorized by law, as it would have been futile to require petitioner to pursue issue further in state-court proceedings; prisoner's ex post facto argument had been presented to, and rejected by, Texas Court of Criminal Appeals. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1; Vernon's Ann.Texas C.C.P. art. 37.10(b).

2. Constitutional Law ⇐199

For purposes of ex post facto clause, once it is determined that law in question was applied retrospectively, salient issue becomes whether law operated to disadvantage accused in exercise of substantial right or protection that he previously enjoyed, not whether circumstances of application conformed to paradigmatic or illustrative category of harms. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

3. Constitutional Law ⇐199
Criminal Law ⇐13.2

As to defendant who was sentenced under procedure that was not authorized by Texas law at time of commission of offense, retroactive application of statute which allowed appellate court to reform

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unauthorized verdict without necessity of remanding for retrial altered defendant's right to retrial—a substantial right—to his material disadvantage; thus, application of statute against defendant violated ex post facto clause of Federal Constitution. U.S. C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1; Vernon's Ann.Texas C.C.P. art. 37.10(b).

John R. "Randy" Farrar, Staff Counsel for Inmates, TDC, Huntsville, Tex., for petitioner-appellant.

S. Michael Bozarth, Asst. Atty. Gen., and Jim Mattox, Atty. Gen., Austin, Tex., for respondent-appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before GEE, GARZA and JONES, Circuit Judges.

GARZA, Circuit Judge:

This case presents a novel question in the Fifth Circuit under the *Ex Post Facto* clause of the United States Constitution. We are convinced that article 37.10(b) of the Tex.Code Crim.Proc., as applied to petitioner Youngblood under the circumstances of this case, violates the *Ex Post Facto* clause. We therefore REVERSE the district court's decision denying appellant's writ of habeas corpus and REMAND the case for a new trial.

BACKGROUND

On March 17, 1982, appellant Carroll Youngblood was convicted by a Texas jury of aggravated sexual abuse. He was sentenced to life imprisonment and a fine of $10,000. His conviction was affirmed on appeal. Subsequently, he filed an application for a writ of habeas corpus with the Texas Court of Criminal Appeals, relying upon *Bogany v. State*, 661 S.W.2d 957 (Tex.Crim.App.1983) (en banc). In *Bogany*, the Texas Court of Criminal Appeals held that the sentence enhancement provision, section 12.42(c) Tex.Penal Code, does not authorize punishment to include a fine in addition to a prison sentence. The *Bogany* court concluded that the jury's verdict was void at its inception. It reversed the judgment and ordered a new trial.

In response to the *Bogany* decision, the Texas Legislature enacted article 37.10(b), Tex.Code Crim.Proc., which permits reformation of a verdict to omit any punishment not authorized by law. Article 37.10(b) eliminates the need to retry a convicted defendant. This provision went into effect on June 11, 1985. On October 9, 1985, the Texas Court of Criminal Appeals announced its decision in *Ex parte Johnson*, 697 S.W.2d 605 (Tex.Crim.App.1985) (en banc), which held that article 37.10(b) is procedural in nature and can be applied retroactively. In dissent, presiding Judge Onion of the Texas Court of Criminal Appeals argued that the retroactive application of article 37.10(b) violated the *Ex Post Facto* clause. One week later, on June 16, 1985, the Texas Court of Criminal Appeals denied Youngblood's application for writ of habeas corpus and, relying upon *Johnson*, applied article 37.10(b) to Youngblood's conviction, thereby deleting the unauthorized fine assessed by the jury.

Youngblood then filed a writ of habeas corpus petition in federal district court contending that the retroactive application of article 37.10(b) violated the *Ex Post Facto* clause of the United States Constitution. The district court dismissed Youngblood's petition. He now appeals from that dismissal.

Discussion

Exhaustion of State Remedies.

[1] The government argues that Youngblood's petition should be denied because he has never presented his federal *ex post facto* claim before a state tribunal in post-conviction proceedings. The district court concluded that forcing appellant to resort to post-conviction proceedings before the Texas Court of Criminal Appeals would be futile. We agree.

The Texas Court of Criminal Appeals decided *Ex parte Johnson* in October of 1985. In that case, the court concluded that art. 37.10(b) was purely procedural and might properly be applied to reform an

unauthorized verdict in cases that were pending at the time of the statute's passage. Also in that case, presiding Judge Onion argued in dissent that retroactive application of art. 37.10(b) violates the *Ex Post Facto* clause. One week after the decision in *Johnson*, the Texas Court of Criminal Appeals relied upon the same reasoning to deny Youngblood's state habeas petition. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex.Crim.App.1985). Thus, it is clear that the *ex post facto* argument urged by Youngblood has been presented to, and rejected by, the Texas Court of Criminal Appeals. The district court was correct to conclude that it would be futile to require Youngblood to pursue this issue further in state-court proceedings.

The Ex Post Facto Clause.

Nine years after the adoption of the United States Constitution, the Supreme Court had occasion to consider the meaning of the words *ex post facto* as used in Art. I, § 9, cl. 3 and Art. I, § 10, cl. 1. In *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), the Court concluded that an *ex post facto* law is any provision that renders criminal "an action done before the passing of the law and which was innocent when done," or that "makes a crime greater than it was, when committed," or that "inflicts a greater punishment, than the law annexed to the crime, when committed," or that "alters the legal rules of evidence." *Id.*, 3 Dall. at 390.

More recently, the Supreme Court has stated that two critical elements must be present for a law to fall within the *ex post facto* prohibition. First, it " 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.' " *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981)). The Court also noted that a law which merely changes "modes of procedure" will not violate the *Ex Post Facto* clause unless it also alters "substantial personal rights" of the accused. *Miller*, 482 U.S. at 430, 107 S.Ct. at 2451 (citing *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977)). It is uncontroverted that the Texas Court of Criminal Appeals, and the district court below, approved the application of art. 37.10(b) to events that occurred in Youngblood's case before the enactment of the statute. The decision in this case turns upon whether the application of 37.10(b) worked to the disadvantage of the defendant.

At the time Youngblood was convicted, the jury rendered a verdict that was unauthorized by law; it assessed a term of years imprisonment in addition to a $10,000 fine. Also at the time of conviction, assessment of an unauthorized fine rendered the verdict void *ab initio* under Texas law and entitled the defendant to a new trial. Subsequent to Youngblood's conviction, the Texas legislature passed art. 37.10(b), which allowed an appellate court to reform an unauthorized verdict of the type assessed against Youngblood without the necessity of remanding for retrial. The Texas Court of Criminal Appeals then declared, in *Ex parte Johnson*, 697 S.W.2d 605, 607 (Tex.Cr.App.1985) (en banc), that art. 37.10(b) could be applied retroactively, to previously void verdicts. The majority concluded that, since the statute "does not constitute substantive law defining criminal acts or providing for penalties, it is procedural in nature." Thus, according to the court, the statute may be applied to pending as well as future cases.

The government urges that "it cannot be argued" that art. 37.10(b) effects substantive changes in the law when the highest state court yet to consider the question has declared it purely procedural. However, the government misapprehends the authority of this Court to decide whether the retrospective application of a state criminal statute violates the *Ex Post Facto* clause. Whether the standard of punishment established by a later state statute is more onerous than, or worsens the conditions imposed by, its predecessor, is a uniquely federal question which will be determined by the federal courts themselves. *Weaver v. Graham*, 450 U.S. 24, 33, 101 S.Ct. 960, 966, 67 L.Ed.2d 17 (1981); *Lindsey v.*

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Washington, 301 U.S. 297, 400, 57 S.Ct. 797, 798, 81 L.Ed. 1182 (1937).

The state court's analysis of art. 37.10(b), as applied to Youngblood and others similarly situated, is faulty to the extent that it terminates one step short of a complete examination. In precedents dating back more than a century, the Supreme Court has held that statutes regulating procedure will violate the *Ex Post Facto* clause if they deprive the defendant of "a substantial right given to him by the law in force at the time to which his guilt relates." *Thompson v. Utah*, 170 U.S. 343, 352, 18 S.Ct. 620, 623, 42 L.Ed. 1061 (1897). Procedural statutes must "leave untouched all the substantial protections with which existing law surrounds the person accused of crime." *Id.*, citing *Duncan v. Missouri*, 152 U.S. 377, 382, 14 S.Ct. 570, 572, 38 L.Ed. 485 (1894).

Thus, we may accept the state court's characterization of 37.10(b) as procedural and still disagree with its conclusion in *Ex Parte Johnson* that the statute's application in these circumstances suffers from no *ex post facto* infirmity. The question is whether Youngblood's right to retrial, to which he was entitled before the passage of art. 37.10(b), was a "substantial protection" within the meaning of the Supreme Court's *ex post facto* jurisprudence.

The government argues that the retroactive application of art. 37.10(b) cannot offend the *Ex Post Facto* clause because it does not punish as a crime a previously innocent act, or make more burdensome the punishment of a crime after its commission or deprive the defendant of a defense available at the time the act was committed. Likewise, the authorities appended to the government's brief erroneously suggest that a statute must fit neatly within the confines of one of these enumerated pigeon holes or else it may not rightly be said to violate the *Ex Post Facto* clause.

These authorities fail to consider the import of *Thompson v. Utah*, *supra*, wherein the Supreme Court held that a law which authorized a jury of only eight persons, instead of twelve, to pass upon the guilt of the defendant, when applied retroactively, violated the *Ex Post Facto* clause. In that case, there was no punishment of a previously innocent act, there was no change in the burden of proof required to establish guilt and there was no elimination of a previously available defense. The focus in *Thompson v. Utah* was upon whether the retrospective deprivation of the right to trial before a jury composed of twelve persons rather than eight materially altered the position of the defendant to his disadvantage.[1]

[2] In two other early cases, the Supreme Court instructed that a statute need not even relate to a crime, or inflict a punishment, in the judicial sense, for the commission of past crimes, in order to constitute an *ex post facto* law. In *Cummings v. The State of Missouri*, 4 Wall. 277, 18 L.Ed. 356 (1866), the Court held that the exclusion of a minister from the exercise of his clerical function unless he agreed to take an oath that he had not engaged in or encouraged armed aggression against the United States government was an *ex post facto* law. Similarly, in *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366 (1866), the Court found that the exclusion of a lawyer from practice for his refusal to take the oath described in *Cummings*, *supra*, was *ex post facto*. Clearly then, determination of the question whether a statute punishes a previously innocent act, or makes more burdensome the standard of proof, or eliminates a defense that was available at the time the act was committed cannot be dispositive of the inquiry whether such a statute violates the *Ex Post Facto* clause. Once it is determined that the law in question was applied retrospectively, the salient issue becomes whether the law operated to disadvantage the accused in the exercise of a substantial right or protection that he previously enjoyed, not whether the circumstances of its application conform to a paradigmatic or illustrative category of harms.

[3] At the time of Youngblood's conviction, it was the law of Texas that a verdict of the type rendered in this case was void *ab initio* and its imposition entitled the accused to a new trial. That right, with its attendant possibility that a second jury just might acquit the defendant, was apparently considered sufficiently "substantial" to provoke the Texas legislature to enact art. 37.10(b), authorizing an appellate court to reform the verdict and thereby deprive the defendant of the right to retrial. In any event, whether or not the Texas legislature perceived the *Bogany* right to be substantial, we conclude that it was.

Prior Texas law made it impossible to deprive defendants such as Youngblood of their liberty without affording them a new trial. Whether or not it is a wise policy to provide that level of protection against unauthorized verdicts, it cannot be gainsaid, in our opinion, that the subsequent elimination of that right worked to appellant's disadvantage.[2] Delineation of the boundary between "substantial" rights and those considered not substantial, like the distinction between fundamental and non-fundamental rights, is an inquiry not susceptible of examination by scientific formulae or comprehensive enumeration. However, given the universal references in the *ex post facto* jurisprudence to such concepts as "material disadvantage" and substantial "protection," we are confident that the right to have one's guilt retried before a different jury—with its attendant possibility that the outcome might be different the second time around—is comfortably encompassed within the category of rights considered "substantial."

Appellant was sentenced under a procedure that was not authorized by Texas law at the time of the commission of his offense. The retroactive application of art. 37.10(b) altered his right to retrial—a substantial right—to his material disadvantage. As applied to Youngblood, therefore, art. 37.10(b) is *ex post facto*. For the reasons set out above, we REVERSE the district court's decision denying appellant's writ of habeas corpus and REMAND this case for a new trial.

GEE, concurring:

Concurring entirely in the majority opinion in this very close case, I also agree with Judge Jones's observations regarding the Supreme Court's "modes of procedure" authorities such as *Thompson v. Utah*. Their present state constitutes more of a bright spectrum than a bright line.

EDITH H. JONES, concurring.

I concur with the majority opinion because, for *ex post facto* purposes, I cannot perceive a meaningful distinction between *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1897), and this case. *Thompson* acknowledged that "mere modes of procedure" are not within the ken of the *ex post facto* clause, but it proceeded to hold that the right to be tried by twelve jurors "was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty," and was enjoyed by the defendant at the time he committed the offense charge. 170 U.S. at 352, 18 S.Ct. at 623. Consequently, Utah's "procedural" change to permit criminal trials before eight jurors was held to operate *ex post facto* to deprive the defendant of this substantial right.

I suggest, however, that the distinction between "mere modes of procedure" and

1. We recognize that, in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court set aside the requirement implicitly established in *Thompson v. Utah* that deliberation by a twelve-member jury is a constitutional prerequisite to a finding of guilt. This revisition of one of the issues in *Thompson v. Utah*, however, left intact the proposition for which we cite that case: an *ex post facto* violation may occur in the absence of an increase in punishment, or a change in the burden of proof or an elimination of a previously available defense.

2. We find understandable the Texas legislature's distaste for a rule of law that affords convicted criminal defendants a "second bite at the apple." Given the vicissitudes of a criminal trial before a jury, such a second chance bestows a considerable benefit upon a defendant at the same time that it imposes an unnecessary burden upon the state. In that regard, article 37.10(b) may well effect wise public policy. However, we may not allow considerations of public policy to interfere with the central inquiry before us: whether the retroactive application of art. 37.10(b) worked to the disadvantage of Youngblood in the exercise of a substantial protection.

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substantial or vital procedural protections is a wobbly one under current Supreme Court jurisprudence. One other early case seems squarely to hold that a procedural change in state law violated the *ex post facto* clause. *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1882) (change in the law applicable to guilty pleas, which exposed defendant to conviction for a more serious crime, and operated retroactively, violated *ex post facto* clause). A number of other decisions have found no *ex post facto* violation in retroactive "procedural" changes. *See Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) (change in role of Florida juries in death penalty cases); *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925) (defendant forced to undergo joint rather than separate trial for crime); *Mallett v. North Carolina*, 181 U.S. 589, 21 S.Ct. 730, 45 L.Ed. 1015 (1901) (state allowed to appeal from intermediate court's award of new trial to defendant); *Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898) (prior to second trial, law was changed to make circumstantial evidence admissible against defendant and he was convicted); *Gibson v. Mississippi*, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075 (1896) (change in juror qualifications); *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884) (change to allow convicted felon to testify as a witness against defendant).

There is little doubt that the defendant in several of these later cases was materially disadvantaged by the changes in criminal procedure which occurred after the commission of his offense. Consider the significance to a defendant of the right to a separate rather than joint trial with co-defendants, (*Beazell*) or of prohibiting testimony of a convicted felon (*Hopt*) or circumstantial evidence (*Thompson*) against a defendant, to say nothing of prohibiting the state's appeal from the grant of a new trial to the defendant (*Mallett*). The Court emphasized, however, in *Dobbert*, that:

> Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.

432 U.S. at 294, 97 S.Ct. at 2296.

If we are to continue to hold that "procedural" changes that do not affect the traditional *ex post facto* concerns—the definition of a proscribed or criminal act or its punishment or available defenses [1]—nevertheless run afoul of the clause, I fear that the Supreme Court's decisions offer little guidance for distinguishing among such procedural cases. In the absence of such guidance, I can see no overriding principle from which to disagree with the majority's conclusion that *this* procedural change so substantially affected the defendant's rights as to violate the *ex post facto* clause.

1. In *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68, 70 L.Ed. 216 (1925), Mr. Justice Stone summarized the characteristics of an *ex post facto* law:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."

UNITED STATES of America, Plaintiff,

v.

HIBERNIA NATIONAL BANK, Defendant-Third Party Plaintiff-Appellant-Cross Appellee,

v.

Joseph M. RAULT, Jr., Third Party Defendant-Appellee-Cross Appellant.

No. 88-3406.

United States Court of Appeals, Fifth Circuit.

Sept. 8, 1989.

The United States brought action against bank and corporation which owned

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2888

U.S. COURT OF APPEALS
FILED
OCT 18 1989
GILBERT E. GANUCHEAU
CLERK

CARROLL F. YOUNGBLOOD,

Petitioner-Appellant,

versus

JAMES A. LYNAUGH, Director
Texas Departmen tof Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion SEPTEMBER 8, 5 Cir., 1989, ____F.2d____)

(OCTOBER 19, 1989)

Before GEE, GARZA and JONES, Circuit Judges.

PER CURIAM:

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-8

REHEARING FLD. 10/6/89

APPENDIX C

ODD 9-15-88

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SEP 14 1988
MURRAY L. HARRIS, CLERK
BY DEPUTY Lorie Hewitt

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CARROLL F. YOUNGBLOOD)
)
VS.) CIVIL ACTION NO. TY-86-211-CA
)
JAMES LYNAUGH, DIRECTOR,)
TEXAS DEPARTMENT OF CORRECTIONS)

ORDER

On March 17, 1982, the petitioner Carroll F. Youngblood was convicted of aggravated sexual abuse (Tr. 25). The jury assessed punishment of life imprisonment and a fine of $10,000.00 (Tr. 30, 34-35). His conviction was affirmed on appeal on August 13, 1984. Subsequently, Youngblood filed an application for a writ of habeas corpus with the Texas Court of Criminal Appeals. Youngblood relied upon Bogany v. State, 661 S.W.2d 957 (Tex. Crim. App. 1983), in which the Texas Court of Criminal Appeals held that the enhancement provision, Section 12.42(c), Tex. Penal Code (West 1974), does not authorize the punishment to include a fine in addition to a prison sentence. The court in Bogany concluded that the jury's verdict was void at its inception, and reversed the judgment. Bogany v. State, 661 S.W.2d, at 959.

After Bogany was decided, the Texas Legisature enacted Article 37.10(b), Tex. Code Crim. Proc. (West Supp. 1988), which provides:

> If the jury assesses punishment in a case and the verdict assesses both punishment that is authorized by law for the offense, and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict

Civil ... Book
Vol. 132 Page 130

> under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

This provision became effective on June 11, 1985. On October 9, 1985, the Texas Court of Criminal Appeals announced its decision in Ex parte Johnson, 697 S.W.2d 605 (Tex. Crim. App. 1985), which held that Article 37.10(b) is procedural in nature and can be applied retroactively. In a dissent, Presiding Judge Onion expressed the opinion that the retroactive application of the provision violated the Ex Post Facto Clause. Ex parte Johnson, 697 S.W.2d, at 610-612. One week later, on October 16, 1985, the Texas Court of Criminal Appeals denied Youngblood's application for a writ of habeas corpus, basing its decision on Ex parte Johnson. As in Johnson, the court applied Article 37.10(b) to Youngblood's conviction, although his conviction had already become final. Ex parte Youngblood, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985).

Youngblood now seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254 from this Court. As grounds for issuance of the writ, he contends that the retroactive application of article 37.10(b) violated the Ex Post Facto Clause, United States Constitution, Article I, Section 10, Clause 1. The respondent contends that Youngblood has failed to exhaust his state remedies as required by 28 U.S.C. §2254(b) and (c). Specifically, the respondent argues that Youngblood has not raised his ex post facto argument before the Texas Court of Criminal Appeals; therefore, his federal habeas petition is premature. Alternatively, if the Court so finds that Youngblood has

satisfied the exhaustion requirement, then the respondent argues that retroactive application of Article 37.10(b) to Youngblood's case was merely procedural with no substantive effect to violate the ex post facto prohibition.

Exhaustion of State Remedies Question

Youngblood argues that Presiding Judge Onion's discussion of the ex post facto question in Ex parte Johnson obviated the need to again raise the issue before the Texas Court of Criminal Appeals. In his dissent, Presiding Judge Onion posed the question whether Article 37.10(b) could be applied retroactively. He then quoted Article I, Section 16 of the Texas Constitution which provides:

> No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligations of contracts, shall be made.

Next Presiding Judge Onion quoted extensively from an interpretive commentary of the above-quoted state constitutional provision. That commentary defines an ex post facto law and notes that the Texas Constitution goes further than the United States Constitution for the former is not confined to forbidding ex post facto laws, but also bans any retroactive law. Ex parte Johnson, 697 S.W.2d, at 609-610. As stated supra, a majority of the Texas Court of Criminal Appeals relied upon Johnson to deny Youngblood's application for a writ of habeas corpus. Ex parte Youngblood, 698 S.W.2d, at 672. Judge Clinton, joined by Presiding Judge Onion and Judge Teague, stated in a dissent that, for the reasons set forth in tne dissenting opinion in Johnson, Johnson was wrongly decided. Ex parte Youngblood, 698 S.W.2d, at

672. One of those reasons, of course, included Presiding Judge Onion's discussion of ex post facto problem encountered when applying Article 37.10(b) retroactively.

After thoroughly reviewing Youngblood's state application for a writ of habeas corpus, the Court finds that he did not specifically raise the ex post facto issue before the Texas Court of Criminal Appeals. However, his failure to do so does not bar him from the federal courthouse. Federal habeas petitioners need not exhaust state remedies where it is plain that to resort to the state courts would be futile. United States ex rel. Reis v. Wainwright, 525 F.2d 1269, 1272 (5th Cir. 1976). Here a majority of the Texas Court of Criminal Appeals has twice rejected Presiding Judge Onion's position that retroactive application of Article 37.10(b) constitutes a prohibited ex post facto law. See United States ex rel. Reis v. Wainwright, 525 F.2d, at 1272. See also Gartrell v. Lynaugh, 833 F.2d 527, 528-529 (5th Cir. 1987). There is nothing in this Court's review of prevailing state law to indicate that the Texas Court of Criminal Appeals will retreat from its Johnson and Youngblood decisions by adopting Presiding Judge Onion's dissent. Having found that Youngblood is excused from the exhaustion requirement, the Court shall consider the issue of whether the Texas Court of Criminal Appeals' retroactive application of Article 37.10(b) violated the federal constitutional prohibition of ex post facto laws.

Ex Post Facto Law Question

Article I, Section 10, Clause 1 of the United States Constitution provides that no State shall pass any ex post facto law. An ex post facto law (1) makes an action completed before the passing of the law, criminal, and punishes such action; (2) aggravates a crime, or makes it greater than it was, when committed; (3) changes the punishment and inflicts a greater punishment, than the law annexed to the crime, when committed; or (4) alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. Miller v. Florida, ___ U.S. ___, 107 S.Ct. 2446, 2450 (1987). For a criminal law to be ex post facto, it must (1) be retroactive (i.e., apply to events occurring before its enactment) and (2) disadvantage the offender affected by it. Miller v. Florida, ___ U.S., at ___, 107 S.Ct., at 2451. Although a law may operate to the offender's detriment, no ex post facto violation occurs if the change in the law is merely procedural and does not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt. However, a change in the law that alters a substantive right can be ex post facto even if the statute takes a seemingly procedural form. Miller v. Florida, ___ U.S., at ___, 107 S.Ct., at 2452-2453. See Weaver v. Graham, 450 U.S. 24, 30-31, 101 S.Ct. 960, 965 (1981). Moreover, an unforeseeable judicial enlargement of a criminal statute, applied retroactively

may operate as an ex post facto law. Bouie v. City of Columbia, 378 U.S. 347, 353-354, 84 S.Ct. 1697, 1702-1703 (1964).

It is readily apparent that the Texas Court of Criminal Appeals' application of Article 37.10(b) here was retroactive and disadvantaged Youngblood. Under the law effective at the time his conviction became final, he would have been entitled to a new trial because the jury assessed an unauthorized punishment. However, with the new statute, enacted and applied to his case after his conviction became final, the unauthorized punishment was simply stricken. Although the application of Article 37.10(b) to Youngblood's case appears to satisfy the test for an ex post facto law, the retroactive application, however, does not criminalize and punish a prior action, aggravate a crime when committed, inflict a greater punishment, nor alter the legal rules of evidence. Thus, the retroactive application of Article 37.10(b) does not fall within the classic definition of an ex post facto law.

Due to a procedural change, Youngblood lost an entitlement to a new trial. His punishment, however, was not increased (but actually decreased), and the elements of the offense or the ultimate facts necessary to establish guilt were not changed. The Texas Court of Criminal Appeals' retroactive application of Article 37.10(b) does not transgress the federal constitutional prohibition against ex post facto laws. It is therefore

ORDERED that Youngblood's petition for a writ of habeas corpus be DENIED and his case be DISMISSED.

SIGNED this 13th day of September, 1988.

ROBERT M. PARKER
UNITED STATES DISTRICT JUDGE

APPENDIX D

therefore void at its inception. *Moya v. State*, 681 S.W.2d 41, 42 (Tex.Cr.App.1984).

[2] This Court is without authority to reform applicant's sentence. The proper procedure is to remand for new sentencing. *Releford v. State*, 683 S.W.2d 385 (Tex.Cr.App.1984); *Ex parte Spaulding*, 687 S.W.2d 741 (Tex.Cr.App.1985). Because punishment was assessed by the court, we remand for a new punishment hearing only. *Ocker v. State*, 477 S.W.2d 288, 291 (Tex.Cr.App.1972).

The relief prayed for is granted. Applicant's sentence is hereby vacated and applicant is ordered into the custody of the Aransas County Sheriff for a new punishment hearing and sentence. A copy of this opinion shall be forwarded to the Texas Department of Corrections.

It is so ordered.

TOM G. DAVIS, J., not participating.

Ex parte Carroll Frank YOUNGBLOOD.

No. 69471.

Court of Criminal Appeals of Texas, En Banc.

Oct. 16, 1985.

Defendant was found guilty in the 7th Judicial District Court, Smith County, Donald Carroll, J., of aggravated sexual abuse, and defendant pled "true" to enhancement paragraph and was sentenced confinement for life and $10,000 fine. Defendant applied for writ of habeas corpus, contending that assessment of fine was unauthorized and requesting that judgment and sentence be set aside and new trial ordered. The Court of Criminal Appeals, Miller, J., held that the fine imposed was unauthorized, but the verdict and judgment would be reformed to delete the improper fine.

Order accordingly.

Clinton, J., dissented and filed an opinion in which Onion, P.J., and Teague, J., joined.

1. Criminal Law ⇐1215

Fine of $10,000 imposed upon defendant who was found guilty of aggravated sexual abuse and pled "true" to enhancement paragraph alleging prior felony conviction was unauthorized by law, as Penal Code § 12.42(c), governing sentence of defendant who was once before convicted of felony, does not make provision for assessment of fine in addition to term of imprisonment. V.T.C.A., Penal Code § 12.42(c).

2. Criminal Law ⇐1184(4)

Even though fine of $10,000, imposed upon defendant who was found guilty of aggravated sexual abuse and pled "true" to enhancement paragraph alleging prior felony conviction, was unauthorized, judgment was not void; rather, verdict and judgment would be reformed to delete improper fine.

Carroll Frank Youngblood, pro se.

Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

MILLER, Judge.

This is a post-conviction writ of habeas corpus brought pursuant to Art. 11.07, V.A.C.C.P. Applicant was indicted for the offense of aggravated sexual abuse, with a prior felony conviction alleged for enhancement. The jury found applicant guilty of aggravated sexual abuse and he pled "True" to the enhancement paragraph. Punishment was assessed by the jury at confinement for life in the Texas Department of Corrections and a $10,000 fine.

[1] In his application for writ of habeas corpus, applicant contends that the jury's assessment of a $10,000 fine is unauthorized by V.T.C.A. Penal Code, § 12.42(c) and requests that the judgment and sentence be set aside and a new trial ordered, citing *Bogany v. State*, 661 S.W.2d 957 (Tex.Cr.App.1983).

Section 12.42(c), supra, provides:

"If it be shown on the trial of a first-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 15 years."

No provision is made for assessment of a fine in addition to a term of imprisonment. Thus, the fine imposed in the case at bar was unauthorized by law.

Applicant relies on *Bogany v. State*, 661 S.W.2d 957 (Tex.Cr.App.1983) wherein we held that a judgment containing a punishment unauthorized by law was void since the court was without authority to correct the infirmity. On June 11, 1985, however, Senate Bill 1349, Acts 69th Leg., became effective. In *Ex parte Johnson*, 697 S.W.2d 605 (Tex.Cr.App.1985), we interpreted this amendment to provide a vehicle by which an improper verdict could be reformed, thus correcting the infirmity present in *Bogany*, supra. We also held that the amendment applies to pending and future actions. *Ex parte Johnson*, at 607-608.

[2] In applying *Ex parte Johnson*, supra, to the case at bar, the assessment of $10,000.00 fine was unauthorized. Thus, we need not remand the case for a new trial; rather, we may reform the verdict and judgment and delete the improper fine.

Applicant's request for relief is therefore denied. The judgment in Cause No. 7-81-102 of the 7th Judicial District Court of Smith County is reformed to delete the $10,000.00 fine. The Clerk of this Court shall mail a copy of this Order to the Texas Department of Corrections.

It is so ordered.

TOM G. DAVIS, J., not participating.

CLINTON, Judge, dissenting.

Valid reasons why *Ex parte Johnson*, 697 S.W.2d 605 (Tex.Cr.App.1985), was wrongly decided are set forth in the several dissenting opinions therein, and to reprise them here would be redundant. Nevertheless, this proceeding presents an occasion for the Court to determine whether Article 37.10(b) may be gratuitously invoked and applied by this Court in a post conviction habeas proceeding in which a final judgment of conviction imposes a sentence based upon a *verdict of a jury* assessing punishment not authorized by law. The majority fails to address that question, so I will.

First of all, even if valid, on the face of it Article 37.10(b), V.A.C.C.P. has no application. Obviously focusing on *Bogany v. State*, 661 S.W.2d 957 (Tex.Cr.App.1983), the amendment directs "the appellate court" to reform a jury verdict. The only occasion for an "appellate court" to have jurisdiction to do so is on direct appeal from a judgment of conviction.

In a postconviction habeas corpus proceeding this Court may *hear* a cause "as though originally presented to [it] or as an appeal," Article 11.07, § 3, V.A.C.C.P. Still, as has been often pointed out by the Court, a habeas corpus proceeding may not be used as a substitute for an appeal. *Ex parte Powell*, 558 S.W.2d 480, 481 (Tex.Cr.App.1977). A postconviction habeas application will not lie to correct errors *qua* errors committed in the trial court. The Court does not *decide* a habeas cause in its capacity as an "appellate court."

Secondly, approaching Article 37.10, supra, from another direction, one notes that Article 11.07, V.A.C.C.P., provides that the procedure it outlines "shall be exclusive ...," *id.*, § 3. Thus, even if Article 37.10 is retrospective in the sense erroneously imputed to it in *Ex parte Johnson*, supra,

the procedure it purports to authorize is excluded from a habeas corpus proceeding.

Thirdly, relief available in a habeas corpus proceeding to resolve problems of the nature presented here and in *Ex parte Hernandez*, 698 S.W.2d 670 (Tex.Cr.App., this day decided), has been explicated by this Court in, e.g., *Ex parte Hunter*, 616 S.W.2d 626 (Tex.Cr.App.1981) and *Ex parte Brown*, 575 S.W.2d 517 (Tex.Cr.App.1979). As stated in *Brown*, "the proper inquiry should be who assessed punishment," for if applicant is entitled to any relief from punishment previously assessed, that which is ordered depends upon whether it had been assessed by judge or by jury. When assessed by a judge, the cause is remanded to the trial court for a hearing on punishment, e.g., *Ex parte Hunter*, 616 S.W.2d 626 (Tex.Cr.App.1981); when assessed by a jury, the cause is either dismissed if applicant has served requisite time or remanded to the trial court for a new trial, *Ex parte Brown*, supra.

Applicant is entitled to relief in this habeas corpus proceeding. Because the majority denies it, I dissent.

ONION, P.J. and TEAGUE, J., join.



Joseph Paul TURNER, Appellant,

v.

The STATE of Texas, Appellee.

No. 69221.

Court of Criminal Appeals of Texas, En Banc.

Oct. 30, 1985.

Following remand, 635 S.W.2d 734, defendant was convicted in the 171st Judicial District Court, El Paso County, Edwin F. Berliner, J., of capital murder, punishment was assessed at death, and defendant appealed. The Court of Criminal Appeals, 685 S.W.2d 38, affirmed. On motion for rehearing, the Court of Criminal Appeals, White, J., held that: (1) defendant waived any error regarding relevance of jailer's testimony, and (2) evidence was sufficient to support finding that defendant constituted a continuing threat to society.

Affirmed.

Clinton and Teague, JJ., dissented.

1. Homicide ⇐354

Extraneous offenses offered into evidence at punishment stage of capital murder trial do not have to involve crimes of violence to be relevant to whether defendant is a continuing threat to society. Vernon's Ann.Texas C.C.P. art. 37.071(a).

2. Homicide ⇐354

Extraneous offenses do not have to be finally adjudicated to be admissible at punishment stage of capital murder trial. Vernon's Ann.Texas C.C.P. art. 37.071(a).

3. Homicide ⇐354

It is not necessary that extraneous offenses occur prior to time of commission of alleged capital murder to be admissible at punishment stage of capital murder trial. Vernon's Ann.Texas C.C.P. art. 37.071(a).

4. Homicide ⇐354

Trial court has wide discretion under Vernon's Ann.Texas C.C.P. art. 37.071 in determining what is relevant and admissible at punishment stage of a capital murder trial; this wide discretion amounts to deciding what extraneous offenses are relevant.

5. Homicide ⇐354

Trial court's discretion to decide what extraneous offenses are relevant at punishment stage of capital murder trial extends to question of relevance of facts sought to be proved and offered into evidence. Vernon's Ann.Texas C.C.P. art. 37.071.